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No. 91-

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD C. WEIDMAN
AND
W. JEFFREY WEIDMAN

Petitioners,

v.

WILLIAM WEIDMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

i. Were Petitioners deprived of their Fourteenth Amendment rights to due process of law and equal protection of the laws when the Virginia Supreme Court refused their pro se petitions for appeal in four cases on the basis of asserted failure to comply in exact form with a procedural rule, after the Virginia Supreme Court had waived its procedural rules ex post facto to deem as timely filed reply briefs in the same four cases on appeal, all of which were filed out of time by counsel for Respondent?

ii. Were Petitioners deprived of their Fourteenth Amendment rights when the Virginia trial court, for reasons of "public interest", consolidated into a single jury trial four cases in which Respondent was party adverse to either one or both of Petitioners, including a contract action brought by one of Petitioners against Respondent, and an assault and battery action brought against same Petitioner?

II. LIST OF ALL PARTIES BELOW

The names of all parties below appear in the caption of this Petition and these parties are Richard C. Weidman, W. Jeffrey Weidman, and William Weidman.

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V. OPINIONS OF OTHER COURTS

The order of consolidation of the four cases was entered on January 11, 1991 by the Circuit Court of Fairfax County, Virginia. The Virginia Supreme Court denied the Petition for Writ of Prohibition on April 22, 1991. The judgment orders in all four cases were entered by the Circuit Court of Fairfax County on May 31, 1991. The Virginia Supreme Court denied the Petitions for Appeal in all four cases on November 25, 1991, and then denied the Petitions for Rehearing in all four cases on January 10, 1992.

VI. JURISDICTION

i. Date of entry of decree sought to be reviewed

The Decree of the Virginia Supreme Court denying the Petitions for Appeal were entered on November 25, 1991.

ii. Date of orders on rehearing

The Decrees of the Virginia Supreme Court

denying the Petition for Rehearing were entered on January 10, 1992.

iii. Not under Rule 12.3 (Not cross-petition)

This is not a cross-petition and thus the provisions of Rule 12.3, Rules of the U.S. Supreme Court, do not presently apply.

iv. Statutory provisions conferring jurisdiction

Petitioners claim rights under the Fourteenth Amendment of the U.S. Constitution in appealing the final Decree of the Virginia Supreme Court, which is "... the highest court of a State in which a decision could be had ...". Therefore, jurisdiction to review by writ of ceriorari the Decree in question and federal constitutional rights claimed in the trial court is conferred on this Court pursuant to 28 U.S.C. Section 1257(a).

VII. CONSITUTIONAL PROVISIONS AND REGULATIONS

i. Constitutional provisions

A. Fourteenth Amendment, Section 1, U.S. Constitution[1]

ii. Regulations and rules of court

A. Rule 5:11 (a) and (b), Rules of Supreme Court of Virginia[2]

B. Rule 5:18 (a), Rules of Supreme Court of Virginia[3]

VIII. STATEMENT OF THE CASE

i. Statement of the Case

This Petition concerns four lawsuits consolidated for trial which were separately filed in the Circuit Court of Fairfax County, Virginia between one or both of Petitioners on the one hand, and Respondent on the other. One of the lawsuits (Circuit Court No.

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[1] See Appendix at 33.

[2] See Appendix at 34.

[3] See Appendix at 35.

L-94238) was an action in quasi contract filed by Petitioner Richard C. Weidman against Respondent, in which Petitioner sought quantum meruit relief for full-time care provided over a five-year period from 1982 to 1987, allegedly at the request of Respondent, to Respondent's ill wife. Approximately five months after the first contractual claim was made against Respondent arising out of this care, Respondent first sued Petitioner Richard C. Weidman for assault and battery arising out of incidents which allegedly occurred in August and September, 1987; this claim, in which Respondent sought $500,000.00 in damages from Petitioner, was nonsuited and refiled in a later suit (Circuit Court No. L-93294). Detinue suits were filed by both Petitioners against Respondent (Circuit Court No. L-94385) and by Respondent against both Petitioners (Circuit Court No. L-93266); Respondent sought $250,000.00 in damages from both Petitioners

in addition to property claimed.

In March, 1990 separate trial dates for each of the four lawsuits were assigned, with trial dates set for the period from May through August, 1991. In a memorandum to the trial court counsel for Respondent requested that the court consolidate all four of the cases into a single jury trial, and the Circuit Court so ruled on December 6, 1990 over the objection of Petitioners. On December 21, 1990 Petitioner Richard C. Weidman moved the trial court to reconsider its order of consolidation, and inquired of the court as to "the unifying transaction out of which all of these suits arise which justifies their joinder into a single trial". The court responded:

> "You and your brother and your father and your mother. It's a big battle over your mother, and the whole shooting match, or most of it is going to come out in every one of these cases. So rather than have that, I'm just going to try them all together and let it all come out in all of the cases."

Petitioners then petitioned to the Virginia Supreme Court for a Writ of Prohibition to prohibit the trial court from proceeding with the scheduled consolidated trial of the cases, and to issue an order vacating the order of consolidation. Petitioners argued that the consolidation was impermissible in that there did not exist a single indivisible injury or damage, a joint wrong, or an identical transaction or occurrence out of which the four actions arose, and that there was no support in Virginia law for consolidation of actions simply because the parties had a blood relationship. Petitioners asserted their rights under the constitutions of Virginia and United States. The Attorney General of Virginia filed a Motion to Dismiss Petition for Writ of Prohibition and a Memorandum in support thereof, in which it was claimed that the consolidated actions arose out of a "family feud" which originated "from a

dispute between the petitioners and their father, William Weidman." The Attorney General also stated: "If Petitioners assert that order consolidating the suits below for trial is erroneous or unsupportable under the law of Virginia, their remedy is to file an appeal with this Court upon conclusion of those proceedings."

The four consolidated actions proceeded to trial before a single jury on May 13 and 14, 1991. As directed by the trial court, the trial was conducted by having evidence put on in each case sequentially, with the first two cases being those in which one or both of Petitioners were plaintiffs, and the last two cases being those in which Respondent was plaintiff. After all of the evidence was put on in all of the cases, the jury retired to deliberate in all four cases. The verdicts found for Respondent in the assault and battery case and awarded him $5,000.00 in compensatory and $50,000.00 in

punitive damages against Petitioner Richard C. Weidman; found for Respondent in the quasi contract case, and awarded nothing to Petitioner Richard C. Weidman; and found for Respondent as to virtually all of the property at issue in the two detinue cases. Petitioner Richard C. Weidman moved the trial court to set aside the verdicts in the assault and battery case and the quasi contract case, and the motion was denied.

After timely filed notice of appeal, Petitioners timely filed four separate petitions for appeal, in each of which assignment of error included that the trial court had abused its discretion in consolidating the cases, and that this prejudiced the interests of the appellants and violated their due process rights. In the appeal of the assault and battery case, Petitioner included as a question presented:

> "Was there patently prejudicial misconduct in argument by counsel for William Weidman, including arguing facts not in evidence, and did this inflame the jury and contribute to an unjustified verdict and an excessive award?"

Counsel for Respondent filed briefs in opposition out of time in all four of the cases appealed. Motion for leave to file opposition briefs out of time was submitted simultaneously with the briefs, and was itself filed beyond the time period sought to be extended, which is twenty-one days after service of the petition for appeal, according to Rule 5:18(a) of Rules of Virginia Supreme Court. The motion stated: "Due to professional commitments and the fact that all four cases were appealed simultaneously, counsel was unable to complete the briefs within the time allotted." In each of their memoranda in opposition to untimely filing of opposition briefs, Petitioners argued that the rules should not be waived in that any

extra burden on counsel for Respondent of filing four simultaneous briefs was a direct result of his own request that the cases be consolidated for trial. Petitioners further responded that "professional commitments" of counsel for Respondent as a member of the Virginia Disciplinary Board, to which he was appointed by the Chief Justice of the Virginia Supreme Court, could not justify waiving of the rule. On October 24, 1991 the Virginia Supreme Court granted the motion of Respondent and the briefs in opposition were considered filed.

Trial transcripts were timely filed in accordance with Rule 5:11(a) of Rules of Virginia Supreme Court. Accompanying the transcripts and filed with them was a letter addressed to the Clerk of the Circuit Court requesting that the transcripts be filed in the four cases on appeal.[4] The letter was

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[4]See Appendix at 30.

dated on the date of filing of the transcripts, was signed in the hand of Petitioner Richard C. Weidman, and at the bottom of the letter it stated: "cc: Bernard J. DiMuro, Esq.". On the day of filing, a copy of the letter was mailed to Bernard J. DiMuro, Esquire, counsel for Respondent. On November 25, 1991 the Virginia Supreme Court refused the petitions of appeal in all four cases stating in each case that "no notice of filing the transcript was filed in the trial court". Petitioners then filed a petition for rehearing in each of the cases, attaching thereto a copy of the letter which accompanied the filing of the transcripts, which copy bore the stamp of the Clerk of the Circuit Court indicating filing on the date of the letter. Petitioners stated that they believed the letter constituted notice of filing as required by Rule 5:11(b) of Rules of Virginia Supreme Court, and that they therefore believed they had substantially

complied with the procedural rules in substance and form. The petitions for rehearing were denied on January 10, 1992.

ii. Stage in Proceedings Where Issue Raised

Petitioners objected to the Chief Judge of the Circuit Court of Fairfax County in a letter dated December 10, 1990 that consolidating all of the suits into a single trial would deprive Petitioners of "due process"; the Chief Judge responded by letter that the consolidation "... serves the parties' interest and the public's interest."

In the Petition for Writ of Prohibition, filed in the Virginia Supreme Court in March, 1991, Petitioners stated as follows: "The Petitioners contend that the misjoining violates the rights to due process under Article I, Section 11 of the Constitution of Virginia, and their rights to due process and equal protection of the laws under the Fourteenth Amendment of the United States

Constitution." The Virginia Supreme Court denied the petition.

On appeal to the Virginia Supreme Court the first assignment of error in each of the petitions of appeal stated either that "... the consolidation prejudiced the interests of the appellant in this action and violated his right to due process" or that "... the consolidation prejudiced the interests of the appellants in the present action and violated their rights to due process." The petitions for appeal were denied on the basis of asserted failure to comply in exact form with a procedural rule.

In Petitioners' memorandum in opposition to untimely filing of opposition briefs it was stated: "The request to waive the Rules of Court is simply another attempt by counsel for William Weidman in these actions to circumvent due process requirements, as was his request to the lower court to misconsolidate the four actions."

In the petitions for rehearing in each of the cases filed with the Virginia Supreme Court it was stated: "Should the Court not consider the original of the attached document, which was filed in a timely manner, as notice of filing the transcript as required by the rules, the appellant(s) would respectfully object on the constitutional grounds of due process and equal protection." The petitions for rehearing in all of the cases were denied.

IX. ARGUMENT FOR ALLOWANCE OF WRIT

i. Basis for Petition

Petitioners contend that it is appropriate for this Court to grant a Writ of Certiorari to review several important questions. The Virginia Circuit Court has defined severe "public interest" limits to the due process rights of the individual, where such interests are at best matters of expediency and do not involve vital

governmental functioning. The question of where the Constitutional limits lie for trial courts which consolidate actions at the expense of the due process rights of litigants is an important issue to address given the increasing number of cases on trial court dockets. Petitioners contend that the "public interest" actually lies in discouraging unjustifiable consolidation of lawsuits and thereby minimizing improper retaliatory counter-suits whose actual purpose is to prejudice chances of recovery in the original action. This Petition, as well as the Petition for Writ of Prohibition to the Virginia Supreme Court, raises the fundamental question of the extent to which a state trial court can exercise its discretion in consolidating lawsuits for trial before exceeding its jurisdiction by consolidating suits arising from acts of independent tortfeasors that obviously do not concur in producing a single indivisible injury or

damage. Equal protection rights also arise in that members of one particular family, simply because of their blood relationship to an adversary in litigation, have been denied the right which unrelated litigants or other related litigants enjoy of separate jury trials on distinct claims.

Petitioners assert that it is appropriate for this Court to grant a Writ of Certiorari in that this Petition involves questions of equal treatment in the highest court of a state, as well as effectively unequal access to appellate review. Petitioners contend that when the highest court of a state waives its procedural rule which is framed in mandatory language, where such waiver clearly may operate to the detriment of one of the adversaries, the review of this Court is appropriate. Petitioners contend that review of this question is of fundamental importance to all

appellants in the highest court of a state, in that the very concept of "due process" has little meaning when mandatory rules can be arbitrarily waived. Petitioners also believe that review would be appropriate as to whether asserted failure of Petitioners to conform to a rule of the Virginia Supreme Court, when Petitioners substantially complied with the procedural rule both in substance and form, should bar review of the constitutional claims presented.

ii. Rights denied on appeal

Petitioners contend that they were denied their due process and equal protection rights on appeal to the Virginia Supreme Court.

Rule 5:18(a) of the Rules of Virginia Supreme Court prescribes the time permitted for filing a brief in opposition.[5] Although

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[5]See Appendix at 35.

the first sentence of the the rule states that a brief in opposition "may be filed" within twenty-one days after the petition for appeal is served on counsel for the appellee, the use of permissive terms is employed only to express that an appellee in a civil case may forgo filing a brief in opposition. The mandatory nature of the twenty-one day period, if a brief is to be filed at all, is evident from the mandatory terms used in the second sentence of the rule: "Within the same time he shall mail or deliver a copy to counsel for appellant."[6] Briefs in opposition in all four actions on appeal were filed out of time by counsel for Respondent, who did not even request an extension for the time of filing within the period sought to be extended. Respondent's motion for leave to file opposition briefs out of time was

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[6]See Appendix at 35.

granted without comment after the objections to the granting of the motion were raised by Petitioners.

The Petitions for Appeal were denied in that the appeals were "... not perfected in the manner prescribed by law in that no notice of filing the transcript was filed in the trial court ..." and Rule 5:11(b) was cited.[7] Petitioners contend that notice of filing of the transcript was filed in the trial court, and that their letter dated July 5, 1991 to the Clerk of the Circuit Court[8] constitutes the notice of filing. Petitioners also assert that, not only was notice of filing of the transcripts filed, but that the form of the letter-notice complied with any requisite elements of the notice required by Rule 5:11(b): it was

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[7] See Appendix at 34.

[8] See Appendix at 30.

written notice; it was dated on the date of filing of the transcript; and addended to the bottom of the letter was the statement "cc: Bernard J. DiMuro, Esq." appearing next to the signature of Petitioner, which Petitioners contend constituted the "certificate of counsel" that "a copy of the notice has been mailed to all other counsel". There is no prescription in the Rules of Virginia Supreme Court of the form the "certificate of counsel" referred to in Rule 5:11(b) must take. Furthermore, it has not been asserted that the letter-notice was not timely filed with the Clerk of the trial court. A copy of the letter-notice was addended to the Petitions for Rehearing that were denied without comment despite Petitioners' assertion of their rights to due process and equal protection should their Petitions for Rehearing be denied. Petitioners were not informed by the Virginia Supreme Court of the form the Court required

the notice to take or the manner in which the letter-notice failed to comply with Rule 5:11(b); nor were Petitioners afforded the opportunity to refile the notice out of time in a form approved by the Virginia Supreme Court.

Petitioners contend that the rule arbitrarily waived in its entirety to benefit Respondent was an equal if not a higher-order requirement than the rule upon which denial of the petitions was based, in that at worst Petitioners could have been permitted to refile out of time the notice of filing of transcripts in an acceptable form, and still have been granted no greater exception to the rules than that granted to Respondent. Petitioners assert that the denial of their petitions constituted an arbitrary exercise of the powers of government in violation of their due process and equal protection rights. Although the right of appeal is not

essential to due process of law, rules governing appeals must operate uniformly.[9] Arbitrary refusal to even give consideration to a petition for appeal in the manner given to similar cases is effectively a selective denial of the right to even petition for appeal. Equal protection is denied when adverse parties to a petition for appeal are treated unequally on appeal with respect to enforcement of mandatory rules: on the one hand, Respondent has been permitted an unquestionable breach of a mandatory rule, where no constitutional right was at issue; on the other hand, Petitioners have been held to the letter of a rule, with which they have arguably complied, where their assertion of federal constitutional rights has been

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[9]See State ex rel. J. Hahn Bakery Co. v. Anderson, 269 Mo. 381, 190 S.W. 857 (1916); Duncan v. Missouri, 152 U.S. 377, 14 S.Ct. 570, 38 L.Ed. 485 (1893).

plainly made.

Petitioners contend that review of possible denial of their Fourteenth Amendment rights by the trial court should not be barred by the denial of their petitions of appeal. Since Petitioners substantially complied with the procedural rule of the Virginia Supreme Court both in substance and form, the asserted failure of Petitioners to conform to Rule 5:11(b) should not bar review by this Court of the constitutional claims presented.[10] The ambiguity of the form the notice of filing of transcripts should take according to Rule 5:11(b) justifies review by this Court in that only firmly established state procedural rules interpose a bar to adjudication of federal constitutional

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[10]See National Association for the Advancement of Colored People v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1963).

claims.[11] The Virginia Supreme Court will extend the mandatory time for filing even a petition for a writ of error in cases where it is found that to deny the extension would abridge a constitutional right[12], although in the present case the petitions of appeal were denied on less compelling procedural grounds in spite of asserted Fourteenth Amendment rights. While a state may choose procedure it deems appropriate for the vindication of federal rights, it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right.[13]

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[11] See James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984); Ford v. Georgia, 498 U.S. ___, 112 L.Ed.2d 935, 111 S.Ct. 850 (1991).

[12] See Tharp v. Commonwealth, 212 Va. 1, 175 S.E.2d 277 (1970).

[13] See Young v. Ragen, 337 U.S. 235, 93 L.Ed. 1333 (1948).

The petition for a writ of prohibition was denied after argument by the Virginia Attorney General that the appropriate forum for challenging the consolidation order would be the filing of a timely appeal with the Virginia Supreme Court upon the conclusion of the consolidated trial; yet when this was done the petitions for appeal were summarily denied on procedural grounds without consideration of the claimed denial of federal rights. However, review of the claimed denial of federal rights would be appropriate for this Court in that the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.[14]

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[14]See Davis v. Wechsler, 263 U.S. 23, 68 L.Ed. 143 (1923).

iii. Rights denied in trial court

Consolidation of the four actions by the trial court into a single jury trial violated the due process rights of Petitioners. Although consolidation of actions is usually a matter of discretion of the trial court, the discretion is abused if consolidation deprives litigants of their rights to due process. Since under Virginia law there is no general statute authorizing the consolidation of actions, the consolidation by the trial court was by authority of the common law which does not permit consolidation where the several actions cannot be joined in the same declaration.[15] The general test in determining whether cases can be consolidated is whether the several

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[15] See Ex parte Ashton, 231 Ala. 497, 165 So. 773 (1936).

suits could have been joined originally, and this depends upon whether misjoinder would result.[16] As to the requirements for joinder, the Virginia Supreme Court has held[17]:

> "It is elementary that under our system of pleading, unless the acts of independent tort feasors concur in producing a single indivisible injury or damage, they may not be sued jointly in a single action."

It is essential that the actions consolidated relate substantially to the same question, subject matter, or transaction, and involve substantially the same defense, so that the evidence applicable to the issue in one case

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[16] See Crowe v. State Highway Department, 216 Ga. 464, 117 S.E.2d 158 (1960); Blumenthal v. Berkley Homes, Inc., 342 Mich. 36, 69 N.W.2 183 (1955); Sanders v. Wilson, 193 Ga. 393, 18 S.E.2d 765 (1942).

[17] See Norfolk Union Bus Terminal, Inc. v. Sheldon, 188 Va. 288, 49 S.E.2d 338 (1948).

would be relevant, material, and admissible to the other.[18] The Virginia statute concerning joinder of claims states: "A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence."[19] Consolidation should not be granted when the result would be complication of fact issues, difficulty to parties, jury and court in presenting or applying law to several tendencies of evidence or prejudice to parties' rights; nor should actions be consolidated unless the same legal and factual issues are involved and the same testimony applies.[20] The Virginia Supreme Court has held that causes in which the

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[18] See Ex parte Ashton, supra; Viele v. Germania Insurance Co., 26 Iowa 9 (1868).

[19] Section 8.01-272, Code of Virginia, 1950 (as amended).

[20] See Ex parte Ashton, supra; Blumenthal v. Berkley Homes, Inc., supra.

parties, the subject matter, and the relief sought are different, are improperly consolidated.[21]

The requisites necessary for proper consolidation of the actions were not fulfilled. Had the suits been joined originally, a misjoinder would clearly have resulted. The four suits, including a suit by one Petitioner against Respondent in quasi contract for services allegedly provided from 1982 to 1987, a suit by Respondent against sam Petitioner for alleged assaults and batteries occurring in August and September of 1987, a suit by Respondent against both Petitioners in detinue, and a suit by both Peitioners against Respondent in detinue, are not concerned with acts of independent tort feasors that "concur in producing a single indivisible injury or damage"; nor do they involve the same subject matter, defense, admissible evidence, or

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[21]See Johnson v. Merritt, 125 Va. 162, 99 S.E. 785 (1919).

parties. The opinion of the trial court that the "unifying transaction" out of which the suits arose was the parties themselves ("You and your brother and your father and your mother.") and the parties' alleged "battle" over the mother of Petitioners cannot justify the impermissible consolidation. One Petitioner had a suit for recovery of his personal property in which he was co-plaintiff consolidated with an assault and battery action (to which he was not party) against his co-plaintiff in the personal property action. The other Petitioner's quasi contract suit was hopelessly prejudiced when Respondent requested and was granted consolidation of the contract action with Respondent's assault and battery action against same Petitioner. The magnitude of the jury award in the assault and battery suit ($5,000.00 in compensatory and $50,000.00 in punitive damages) evinces the degree to which the quasi contract suit was prejudiced by consolidation with the assault and battery

claim. The evidence in the assault and batter suit would clearly have been inadmissible in the quasi contract suit had the suits been tried properly before different juries.

Ironically, it was counsel for Respondent William Weidman who objected at trial to the admission of evidence put on by Petitioner Richard C. Weidman in his defense in the assault and battery suit on the grounds that:

> "All of these things are intended solely to incite and inflame the jury against William Weidman and have no probative value, because they do not go to the contract, the--the performance of the contract. And really all of this evidence about the breakup isn't really probative at all, because it's a quantum meruit suit. Did you perform the services or not? And are you entitled to compensation?"

Thus, counsel for Respondent virtually admitted that only evidence going to the question of whether compensable services were performed should properly have been presented

to a jury deciding the quasi contract suit. The consolidation permitted the jury deciding the contract suit to hear highly inflammatory and irrelevant evidence, including sensational evidence of alleged battery, previously withheld in response to discovery requests, which was struck by the trial court after having been heard by the jury; this in particular effectively nullified in the contract action the due process rights of Petitioner Richard C. Weidman to trial in accordance with the accepted law of evidence. Since the jury awarded punitive damages to Respondent in the assault and battery action, the jury could not reasonably have simultaneously awarded Petitioner in the contract action without negating the punitive intent of the assault and battery verdict. Furthermore, Petitioner asserted in the petition for a writ of prohibition that the consolidation could prejudice his rights in the assault and battery trial: since the only

witness alleged by Respondent in the motion for judgment to have witnessed the alleged assaults and batteries was other Petitioner, W. Jeffrey Weidman, the consolidation compelled W. Jeffrey Weidman, who testified on behalf of Petitioner Richard C. Weidman, to appear as a co-defendant, thus shifting the burden of proving bias from Respondent to Petitioner.

It was asserted by the Circuit Court that the "public interest" was served by the consolidation of the suits. Although the establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest, the Constitution recognizes higher values than speed or efficiency.[22] It has been held by this Court that the due process clause of the Fourteenth Amendment is designed to protect fragile

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[22]See Fuentes v. Shevin, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1971); Reed v. Reed, 404 U.S. 71, 30 L.Ed.2d 225, 92 S.Ct. 251 (1971).

values of vulnerable citizenry from the overbearing concern for efficiency and efficacy of government officials.[23] The fact that expanded hearings will entail additional expense does not justify denying a hearing which meets the standards of procedural due process.[24] "Public interest" cannot be invoked to justify proceedings in which due process rights are denied in the absence of extraordinary circumstances such as furthering a war effort or protecting the public health.[25] Petitioners contend that there was not even significant economy of time and labor in the consolidation, in that evidence in each of the four cases was presented sequentially; and that the only

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[23]See Stanley v. State of Illinois, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972).

[24]See Bell v. Burson, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1971); Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970).

[25]See Fuentes v. Shevin, supra.

effect of the consolidation was to prejudice the rights of Petitioners to a fair trial, to the benefit of the purely private interest of Respondent who had requested the consolidation.

X. CONCLUSION

For the reasons set forth above, Petitioners claim that they have been deprived of property without due process of law, in violation of their rights guaranteed under the Fourteenth Amendment of the U.S Constitution. The consolidation of the actions in the trial court was violative of their rights, as was their unequal treatment on appeal. One Petitioner has suffered an adverse judgment in the amount of $55,000.00, and he has been deprived of his opportunity to be compensated for five years of his labor; both Petitioners have been deprived of personal property which was the subject of litigation.

WHEREFORE, Petitioners request that this Court issue forth a Writ of Certiorari requiring the Supreme Court of Virginia to provide the record and all transcripts in this matter. Petitioners respectfully request that upon receipt of said record, and upon the briefs of the parties hereto, the Court review the issue described in this Petition.

Respectfully submitted,

Richard C. Weidman,
Pro se

W. Jeffrey Weidman,
Pro se

P.O. Box 566
Great Falls, Virginia 22066
Telephone: (703)-476-5295

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of November, 1991.

Richard C. Weidman, Appellant,

against Record No. 911390
Circuit Court No. L-94238

William Weidman, Appellee.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner prescribed by law in that no notice of filing the transcript was filed in the trial court, the Court refuses the petition for appeal filed in the above-styled case. Rule 5:11(b).

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of November, 1991.

Richard C. Weidman, Appellant,

against Record No. 911387
Circuit Court No. L-93294

William Weidman, Appellee.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner prescribed by law in that no notice of filing the transcript was filed in the trial court, the Court refuses the petition for appeal filed in the above-styled case. Rule 5:11(b).

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of November, 1991.

Richard C. Weidman, et al., Appellants,

against Record No. 911392
Circuit Court No. L-93266

William Weidman, Appellee.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner prescribed by law in that no notice of filing the transcript was filed in the trial court, the Court refuses the petition for appeal filed in the above-styled case. Rule 5:11(b).

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of November, 1991.

Richard C. Weidman, et al., Appellants,

against Record No. 911391
Circuit Court No. L-94385

William Weidman, Appellee.

From the Circuit Court of Fairfax County

Finding that the appeal was not perfected in the manner prescribed by law in that no notice of filing the transcript was filed in the trial court, the Court refuses the petition for appeal filed in the above-styled case. Rule 5:11(b).

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WILLIAM WEIDMAN, On behalf of himself, and as committee for MARY ELLEN WEIDMAN, his ward, Complainants,	:	
v.	:	LAW NO. 93266
RICHARD C. WEIDMAN and W. JEFFREY WEIDMAN, Respondents.	:	
RICHARD C. WEIDMAN, Plaintiff,	:	
v.	:	LAW NO. 94238
WILLIAM WEIDMAN Defendant.	:	
WILLIAM WEIDMAN Plaintiff,	:	
v.	:	LAW NO. 93294
RICHARD C. WEIDMAN, et al., Defendant.	:	

RICHARD C. WEIDMAN Plaintiff, v. WILLIAM WEIDMAN Defendant.	:	LAW NO. 94385
RICHARD C. WEIDMAN Plaintiff, v. WILLIAM WEIDMAN Defendant.	:	CHANCERY NO. 117941

ORDER

These matters were heard this 6th day of December, 1990 upon the Court's request for a status conference; and

IT APPEARING to the Court that these matters are sufficiently interrelated to justify consolidation for purposes of trial and that the court can adequately separate issues to be tried to a jury from those to be tried to the Court; it is hereby

ORDERED that all of these cases are consolidated for trial which shall commence on May 13, 1991 at 10:00 a.m. and continue from day to day until completed. All of the other trial dates previously set in these cases are vacated; to which rulings Richard C. Weidman nd (sic) W. Jeffrey Weidman take exception, and it is further

ORDERED that the defendants' Demurrer and Motion to Dismiss Count I in Law Number 93294 are overruled and DENIED; to which ruling Richard C. Weidman and W. Jeffrey Weidman take exception; and it is further

ORDERED that the defendants' Motion for Summary Judgment in Law Number 93266 is DENIED; to which ruling Richard C. Weidman and W. Jeffrey Weidman take exception; it is further

ORDERED that defendants shall file their answers and grounds of defense (if they have not already done so) in Law No. 93294 and 93266 within 15 days.

ENTERED this 11th day of January, 1991.

JUDGE BRUCE BACH

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 22nd day of April, 1991.

In Re: Richard C. Weidman, M.D., et al., Petitioners

Record No. 910468

Upon a Petition for a Writ of Prohibition

On consideration of the petition of Richard C. Weidman, M.D. and another praying that a writ of prohibition do forthwith issue, to be directed to the Honorable F. Bruce Bach, Judge of the Circuit Court of Fairfax County, the motions to dismiss, demurrer and memorandums in support filed on behalf of the respondent judge, the petitioners' motion to deny and memorandum in support filed in reply thereto, the Court is of opinion that the writ of prohibition should not issue as prayed for. It is therefore ordered that the said petition be dismissed and that the respondent recover

of the petitioners his costs by him expended about his defense herein.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

Respondent's costs:

Attorney's fee $50.00

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICHARD C. WEIDMAN, Plaintiff,	:	
v.	:	LAW NO. 94238
WILLIAM WEIDMAN Defendant.	:	

FINAL JUDGMENT ORDER

This cause came on for trial on the 13th day of May, 1991 upon plaintiff's Motion for Judgment for damages arising out of his claim for quantum meruit and the papers previously filed herein. Plaintiff was present in person and proceeded pro se and defendant was present in person and represented by Bernard J. DiMuro, Esquire.

Whereupon from a panel a qualified jury of seven (7) was selected and sworn to well and truly try the case.

Whereupon counsel for the defendant and the plaintiff pro se gave opening statements

and the plaintiff put on his witnesses and other evidence and thereafter rested his case.

Whereupon the defendant moved to strike the evidence which motion was taken under advisement.

Whereupon defendant did present his evidence and rested his case; and plaintiff did present his rebuttal evidence.

Whereupon defendant did renew his Motion to Strike plaintiff's evidence which Motion was taken under advisement.

Whereupon written instructions were presented for consideration by the Court, various of which were granted, denied and withdrawn; thereafter the jury was duly instructed as to the law of the case, and the closing arguments were made by plaintiff pro se and counsel for the defendant.

Whereupon at approximately 3:50 p.m. on the 14th day of May, 1991, the jury did retire for its deliberations and at approximately 4:40 p.m. did return with their verdict in

favor of the defendant and against the plaintiff; and the jury was dismissed.

Upon consideration whereof, it is therefore;

Ordered that judgment is granted in favor of the defendant against the plaintiff who shall recover nothing from the defendant on his claims tried herein.

Entered this 31st day of May, 1991.

And this cause is ended.

_____

F. BRUCE BACH, JUDGE
FAIRFAX CIRCUIT COURT

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WILLIAM WEIDMAN Plaintiff, v. RICHARD C. WEIDMAN et al., Defendant.	:	LAW NO. 93294

FINAL JUDGMENT ORDER

This cause came on for trial on the 13th day of May, 1991 upon plaintiff's Motion for Judgment on his claim of assault and battery and the papers previously filed herein. Defendant was present in person and proceeded pro se and plaintiff was present in person and represented by Bernard J. DiMuro, Esquire.

Whereupon from a panel a qualified jury of seven (7) was selected and sworn to well and truly try the case.

Whereupon counsel for the plaintiff and the defendant pro se gave opening statements and the plaintiff put on his witnesses and

other evidence and thereafter rested his case.

Whereupon defendant did present his evidence and rested his case; and plaintiff did present his rebuttal evidence.

Whereupon written instructions were presented for consideration by the Court, various of which were granted, denied and withdrawn; thereafter the jury was duly instructed as to the law of the case, and the closing arguments were made.

Whereupon at approximately 3:50 p.m. on the 14th day of May, 1991, the jury did retire for its deliberations and at approximately 4:40 p.m. did return with their verdict in favor of the plaintiff and awarded plaintiff FIVE THOUSAND DOLLARS ($5,000.00) in compensatory damages and FIFTY THOUSAND DOLLARS ($50,000.00) in punitive damages; and the jury was dismissed.

Upon consideration whereof, it is therefore;

Ordered that judgment is granted in favor

of the plaintiff against the defendant in the amounts of FIVE THOUSAND DOLLARS ($5,000.00) in compensatory damages and FIFTY THOUSAND DOLLARS ($50,000.00) in punitive damages.

Entered this 31st day of May, 1991.

And this cause is ended.

F. BRUCE BACH, JUDGE
FAIRFAX CIRCUIT COURT

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RICHARD C. WEIDMAN, et. al.	:	
Plaintiffs,	:	
v.	:	LAW NO. 94385
WILLIAM WEIDMAN	:	
Defendant.	:	

FINAL JUDGMENT ORDER

This cause came on for trial on the 13th of May, 1991 upon plaintiffs' Motion for Judgment giving rise to claims in detinue over certain personal property which was allegedly in defendant's possession and the papers previously filed herein. Plaintiffs were present in person and proceeded pro se and defendant was present in person and represented by Bernard J. DiMuro, Esquire.

Whereupon from a panel a qualified jury of seven (7) was selected and sworn to well and truly try the case.

Whereupon counsel for the defendant and

the plaintiffs pro se gave opening statements and the plaintiffs put on their witnesses and other evidence and thereafter rested their case on the 14th day of May, 1991.

Whereupon the defendant moved to strike the evidence as to all counts which motion was taken under advisement.

Whereupon defendant did present his evidence and rested his case; and plaintiff did present their rebuttal evidence.

Whereupon defendant did then renew his Motion to Strike plaintiffs' evidence which Motion was taken under advisement.

Whereupon, by agreement of the parties, the Court instructed the jury that it was to determine the ownership of the property at issue and the closing arguments were made.

Whereupon at approximately 3:50 p.m. on the 14th day of May, 1991, the jury did retire for its deliberations and at approximately 4:40 p.m. did return with their verdict in favor of the defendant and against the

plaintiffs; and the jury was dismissed.

Upon consideration whereof, it is therefore;

Ordered that judgment is granted in favor of the defendant against the plaintiffs.

Entered this 31st day of May, 1991.

And this cause is ended.

F. BRUCE BACH, JUDGE
FAIRFAX CIRCUIT COURT

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WILLIAM WEIDMAN,
on behalf of himself, and
as committee for MARY ELLEN
WEIDMAN, his ward,

Complainants,

v.

RICHARD C. WEIDMAN and
W. JEFFREY WEIDMAN,

Respondents.

LAW NO. 93266

FINAL JUDGMENT ORDER

This cause came on for trial on the 13th day of May, 1991 upon plaintiff's Motion for Judgment for detinue asserting rights of ownership to certain personal property in possession of the defendants and the papers previously filed herein. Plaintiff was present in person and represented by Bernard J. DiMuro, Esquire and defendants were present in person and proceeded pro se.

Whereupon from a panel a qualified jury

of seven (7) was selected and sworn to well and truly try the case.

Whereupon counsel for the plaintiff and the defendants pro se gave opening statements and the plaintiff put on his witnesses and other evidence and thereafter rested his case.

Whereupon defendants did present their evidence and rested their case; and plaintiff did present his rebuttal evidence.

Whereupon, by agreement of the parties, the jury was instructed that they were to determine the ownership rights of all property in dispute, and the closing arguments were made.

Whereupon at approximately 3:50 p.m. on the 14th day of May, 1991, the jury did retire for its deliberations and at approximately 4:40 p.m. did return with their verdict as follows:

(a) that the plaintiff is the owner of all color slides sued upon, of all films sued upon and all black and white photographs

maintained by the defendants which depict members of the Weidman family; and

(b) that the plaintiff does not have an ownership right in any of the phonograph records described in Trial Exhibit 87.

Upon consideration whereof, it is therefore;

ORDERED that judgment is granted in favor of the plaintiff against the defendants as follows:

(a) plaintiff is declared to be the owner of all color slides sued upon, all films sued upon and all black and white photographs depicting Weidman family members in possession of the defendants; and

(b) the defendants are the owners of all phonograph records described in Exhibit 87 which are presently in their possession; and it is further

ORDERED that counsel for plaintiff shall take custody of Trial Exhibits 100 and 101 until any and all appeals are exhausted or the

time for filing same has passed at which time the materials may be turned over to plaintiff; and it is further

ORDERED that defendants shall promptly give to plaintiff's counsel any and all black and white photographs in their possession depicting members of the Weidman family to be held under the same conditions.

Entered this 31st day of May, 1991.

And this cause is ended.

F. BRUCE BACH, JUDGE
FAIRFAX CIRCUIT COURT

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 24th day of October, 1991.

Richard C. Weidman, Appellant,

against Record Nos. 911387 and 911390

William Weidman, Appellee.

Richard C. Weidman, et al., Appellants,

against Record Nos. 911391 and 911392

William Weidman, Appellee.

From the Circuit Court of Fairfax County

On October 3, 1991 came the appellee, by counsel, and filed a motion praying for leave to file briefs in opposition out of time in the above-referenced cases.

Thereupon came Richard C. Weidman, in proper person, and filed responses in opposition to said motion.

On consideration whereof, the appellee's motion is granted, and the briefs in

opposition are considered filed.

A Copy,

Teste:

Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Richard C. Weidman, Appellant,

against Record No. 911390
Circuit Court No. L-94238

William Weidman, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Richard C. Weidman, Appellant,

against Record No. 911387
Circuit Court No. L-93294

William Weidman, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Richard C. Weidman, et al., Appellants,

against Record No. 911392
Circuit Court No. L-93266

William Weidman, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 10th day of January, 1992.

Richard C. Weidman, et al., Appellants,

against Record No. 911391
Circuit Court No. L-94385

William Weidman, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of November, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

P.O.Box 566
Great Falls, VA 22066
(703)-476-5295

July 5, 1991

Clerk of Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

Re: Law No. 93294
Law No. 94238
Law No. 93266
Law No. 94385

Dear Clerk:

Would you please file in the above-referenced cases which are being appealed to the Virginia Supreme Court the following enclosed original transcripts:

1.) Original transcript (2 volumes) of the consolidated trial of the above-reference cases held on May 13-14, 1991;

2) Original transcript of a hearing in these cases held on May 31, 1991;

3) Original transcript of a hearing in these cases held on April 19, 1991; and

4) Original transcript of a hearing in these cases held on December 21, 1990.

Thank you.

Sincerely yours,

Richard C. Weidman, M.D.

cc: Bernard J. DiMuro, Esq.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULES OF VIRGINIA SUPREME COURT

Rule 5:11

(a) Transcript.--The transcript of any proceeding is a part of the record when it is filed in the office of the clerk of the trial court within 60 days after entry of judgment.

(b) Notice.--Within five days after the transcript is filed or, if the transcript is filed prior to entry of judgment, within 5 days after the notice of appeal is filed, counsel for appellant shall (1) give written notice to all other counsel of the date on which the transcript was filed, and (2) file a copy of the notice with the clerk of the trial court. There shall be appended to the notice either a certificate of counsel for appellant that a copy of the notice has been mailed to all other counsel or an acceptance of service of such notice by all other counsel.

RULES OF VIRGINIA SUPREME COURT

Rule 5:18

(a) Filing Time.--A brief in opposition to granting the appeal may be filed with the clerk of this Court by the appellee within 21 days after petition for appeal is served on counsel for the appellee. Within the same time he shall mail or deliver a copy to counsel for appellant. Four copies shall be filed. Carbon copies are acceptable.

Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

(2)

No. 91-1604

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD C. WEIDMAN
AND
W. JEFFREY WEIDMAN

Petitioners,

v.

WILLIAM WEIDMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE VIRGINIA SUPREME COURT

SUPPLEMENTAL BRIEF

Richard C. Weidman,
Pro se

W. Jeffrey Weidman,
Pro se

P.O. Box 566
Great Falls, Virginia 22066
Telephone: (703)-476-5295

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I. TABLE OF CONTENTS..... i

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Motion To Dismiss Petition for Appeal (Virginia Supreme Court Record No. 860675).... App. 1

II. TABLE OF AUTHORITIES

i. Cases

Allen v. Lindstrom, Allen v. Lindstrom, and McGowan v. Coldwell Banker Residential Real Estate Services, Inc., 237 Va. 489, 379 S.E.2d 450 (1989)..... 3

State v. Guerringer, 265 Mo. 408, 178 S.W. 67 (1915)..... 5

Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976)..... 2

ii. Court rules

Rule 15.7, Rules of the U.S. Supreme Court..... 4

Rule 5:11(b), Rules of Virginia Supreme Court..... (pass.)

III. SUPPLEMENTAL FACTS

Since the filing of Petition for Writ of Certiorari, information not previously available to Petitioners has become available to them, involving the specific failure of the Virginia Supreme Court in another case to enforce its Rule 5:11(b)[1], which the Virginia Supreme Court has held to be mandatory and jurisdictional, and upon the alleged failure to comply with which the Virginia Supreme Court denied the appeals of Petitioners.

The case in question concerns several actions consolidated in the Circuit Court of Fairfax County which were appealed to the Virginia Supreme Court (Virginia Supreme Court Record No. 860675) as Edwin H. Allen, et al. v. James Lindstrom, et al. and Edwin H. Allen, et al. v. Timothy R. McGowan, et al. In that appeal, Appellants had failed

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[1] See Petition for Writ of Certiorari, Appendix at 33.

to file any notice of filing of transcripts, as required by Rule 5:11(b). Appellees then filed a Motion to Dismiss Petition for Appeal[2] as well as a memorandum in support thereof, in which Appellees specifically cited the failure of Appellants to comply with Rule 5:11(b). In the memorandum it was stated that:

> "Rule 5:11(b) requires counsel for the appellants to promptly notify all other counsel of the date on which the transcript is filed. Compliance with the provisions of the Rule is mandatory and failure to comply constitutes a jurisdictional bar to the prosecution of the appeal. Towler v. Commonwealth, 216 Va. 533, 221 S.E.2d 119 (1976). The Allens have failed to comply with the provisions of Rule 5:11 and their Petition for Appeal should be dismissed."

The motion was summarily denied without further comment, and the petition for appeal was granted. In the brief in opposition to the appeal, Appellees again

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[2] See Appendix at 1.

raised the jurisdictional issue of noncompliance by Appellants with Rule 5:11(b), the fact of which was never contested by Appellants. The Virginia Supreme Court reversed and remanded one of the cases and reversed and rendered final judgment in the other. The opinion, however, completely ignored the issue of noncompliance with Rule 5:11(b) in spite of the fact that the objection had clearly and unmistakably been made.[3] Thus, although the case record documents the issue, the published record does not reflect the fact that in this other case noncompliance with Rule 5:11(b) was effectively held not to serve as a jurisdictional bar to appellate review. Petitioners were only informed of the unpublished facts of the record in this other case after filing their Petition for

---

[3] See Allen, et al. v. Lindstrom, et al., Allen, et al. v. Lindstrom , et al., and McGowan, et al. v. Coldwell Banker Residential Real Estate Services, Inc., et al., 237 Va. 489, 379 S.E.2d 450 (1989).

Writ of Certiorari, and therefore believe this Supplemental Brief is warranted and is in compliance with Rule 15.7 of the Rules of the Supreme Court of the United States.

Petitioners reiterate that they believe that they complied in substance as well as form with the requirements of Rule 5:11(b) of the Virginia Supreme Court. However, it is clear in the case cited that the Virginia Supreme Court has in the past effectively held that for some persons even unquestionable noncompliance with Rule 5:11(b) does not necessarily serve as a jurisdictional bar to appellate review. But if an appeal be allowed to some persons and not to all persons similarly situated, such deprivation is equivalent to the denial of due process of law, as due process of law and the equal protection of the laws are secured only when the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of

government.[4]

Thus, even had Petitioners not complied with Rule 5:11(b), the invoking of the rule by the Virginia Supreme Court to deny Petitioners' request for review of questions involving their federal constitutional rights is an arbitrary exercise of the powers of government. Not only have Petitioners not received treatment on appeal which is equal to that received by Respondent, but they have also not received treatment equal to that received by other "persons similarly situated" with respect to the requirements of Virginia Supreme Court Rule 5:11(b).

Petitioners respectfully assert that the due process and equal protection issues involved in selective enforcement by the highest court of a state of a mandatory rule--which varies arbitrarily from non-

---

[4] See State v. Guerringer, 265 Mo. 408, 178 S.W. 67 (1915).

enforcement to enforcement beyond the substance and even the form of the rule--warrant review by this Court through the issuance of a Writ of Certiorari.

Respectfully submitted,

Richard C. Weidman,
Pro se

W. Jeffrey Weidman
Pro se

P.O. Box 566
Great Falls, Virginia 22066
Telephone: (703)-476-5295

IN THE SUPREME COURT of VIRGINIA at RICHMOND

RECORD NO. 860675

EDWIN H.ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO. 93488
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees.	:	
.....	:	
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	IN CHANCERY NO. 93960
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees.	:	

MOTION TO DISMISS PETITION FOR APPEAL

Henry F. Brandenstein, Jr.
REES, BROOME & DIAZ, P.C.
Counsel for Appellees
8133 Leesburg Pike, Suite 810
Vienna, Virginia 22180
(703) 790-1911

IN THE SUPREME COURT of VIRGINIA at RICHMOND

EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
JAMES LINDSTROM, et al.,	:	
	:	
Appellees.	:	
.....	:	RECORD NO. 860675
	:	
EDWIN H. ALLEN, et al.,	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
TIMOTHY R. McGOWAN, et al.,	:	
	:	
Appellees.	:	

MOTION TO DISMISS PETITION FOR APPEAL

To: Edwin H. Allen
Wendy L. Allen
c/o Walter B. Golden, III, Esquire
Post Office Drawer No. 2405
9701 Main Street
Fairfax, Virginia 22031

COME NOW the Appellees, TIMOTHY R. and ADELE M. McGOWAN (the "McGowans") by Counsel, and file this Motion to Dismiss the

Petition for Appeal previously served and filed herein, and in support thereof, respectfully state as follows:

1. The Order appealed from is not a Final Order.

2. The Order appealed from is not an appealable interlocutory order within the meaning of Va. Code Section 8.01-671(B).

3. The Appellants have failed to comply with the provisions of Rule 5:11.

4. Judicial economy will best be served by permitting the trial court to resolve and finally determine all the rights and obligations of the parties.

WHEREFORE, the Appellees respectfully request that the Petition for Appeal previously served and filed herein be dismissed and that this matter be remanded

to the trial court for such further proceedings or orders as may be consistent with the ruling of this Court.

TIMOTHY R. McGOWAN
ADELE M. McGOWAN
By Counsel

REES, BROOME & DIAZ, P.C.

By: _____
Henry F. Brandenstein, Jr.
Counsel for Appellees
8133 Leesburg Pike, Suite 810
Vienna, Virginia 22180
(703) 790-1911